

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REA NIECE WHITE and U.S. POSTAL SERVICE,
POST OFFICE, Lubbock, TX

*Docket No. 03-491; Submitted on the Record;
Issued July 1, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has established a recurrence of disability commencing January 29, 2002 causally related to her 1994 accepted back injury.

On February 17, 1994 appellant, then a 37-year-old clerk, filed a claim alleging that on February 15, 1994 she pulled the muscles in her upper right back, shoulders and neck when the back of her chair slipped, causing her to jerk to keep from falling. Appellant's claim was accepted for cervical and lumbar strains, and for a herniated nucleus pulposus of L5-S1.

Appellant received appropriate compensation for intermittent periods of total and partial disability. She accepted a job offer as a modified distribution clerk for the employing establishment on November 14, 2000.

On February 1, 2002 appellant filed a notice of recurrence of disability commencing January 29, 2002.

Appellant submitted reports by Dr. Robert Smeyne, her treating osteopath. In a note dated January 29, 2002, Dr. Smeyne noted that appellant returned for follow up with regard to her lower back pain. He noted that appellant complained that she was having increased pain, and recommended a magnetic resonance imaging (MRI) scan to see if there had been a significant change in appellant's condition. He indicated that appellant was to remain off work until this was completed. Dr. Smeyne completed a duty status report on January 29 2002, indicating that appellant was "off work completely at this time." The MRI was performed on February 7, 2002 by Dr. Charles H. Wheeler, an osteopath. In a February 12, 2002 note, Dr. Smeyne indicated that the MRI performed on February 7, 2002 showed no significant disc interval change with the exception of perhaps slight decreased disc height at the L4-5 level. He did note epidural fibrosis about the right nerve root at L5-6, which was also present on the 1999 study. Dr. Smeyne noted that appellant indicated that she might consider surgical fusion at this time.

On February 24, 2002 Dr. Selma Wilson, a Board-certified anesthesiologist, performed a discogram. She indicated that the L3-4 disc demonstrated mild to moderate recreation of low back pain and right hip pain; the L4-5 discogram demonstrated mild back pain and pressure sensation with bulging of the disc noted; and the L5-S1 discogram was pressure sensation only. Dr. Douglas H. Wright, a Board-certified radiologist, performed a computerized tomography scan of the spine post discogram and found a morphologically abnormal disc at all three levels extending to the left at L4-5 and to the right at L5-S1.

In a March 21, 2002 report, Dr. Smeyne indicated:

“Please see enclosed recent office progress notes which indicate the patient has had increasing pain in her leg with radiation into both hips and down the right lower side of her back and into the right hip and posterior thigh. I have been attempting to treat her conservatively. Unfortunately, the worsening of her condition does not necessarily have to be accompanied by a change on objective findings as often this type of problem with epidural fibrosis and degenerative disc disease have mostly subjective findings. I am in the process of trying to get testing done in the form of discography which may give us some further objective findings but as of yet I do not have this available. I do feel, however, that as the patient’s physician I have no reason to doubt the veracity of her complaints and I believe that her continuing to work potentially could subject her to further injury and disability.”

In a May 10, 2002 report, Dr. J. Nathan Wilson indicated that appellant’s back had become progressively worse. Dr. Wilson assessed progressive disc degeneration with a discogenic pain with correlation with both objective imaging studies on x-ray, MRI and computerized tomography discogram as well as subjective reproduction of pain on the discograms.

By decision dated June 5, 2002, the Office denied appellant’s claim for a recurrence of disability on January 29, 2002.

The Board finds that the evidence fails to establish that appellant sustained a recurrence of disability on January 29, 2002 causally related to her accepted back injury.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.¹

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between her recurrence of disability and her

¹ *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

employment injury.² This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.³

In this case, appellant has not shown a change in the nature and extent of her injury-related condition or of the light-duty requirements. The record shows that appellant most recently returned to light-duty work on or about November 14, 2000. The record does not establish nor did appellant allege, that the claimed recurrence of total disability was caused by a change in the nature or extent of her light-duty job requirements.

Appellant has not submitted sufficient medical evidence establishing that her accepted conditions have materially changed or worsened since she returned to work. Although Dr. Smeyne noted his belief that continuing to work could potentially subject her to further injury and disability, fear of future injury is not compensable under the Act.⁴ Dr. Smeyne's report does not contain sufficient findings of how the accepted L5-S1 disc condition worsened to the degree that she could no longer perform the light-duty work she was performing before she stopped on January 29, 2002. Rather, the medical evidence made findings pertaining to nonaccepted disc conditions at L3-4 and L4-5. The epidural fibrosis noted on MRI had previously been diagnosed in 1999. Although Dr. Wilson indicates that appellant's condition has worsened and that she needed surgery, he provided insufficient rationale supporting appellant's disability for work as of January 29, 2002. The medical evidence does not demonstrate a material change in the accepted L5-S1 disc condition that would have precluded her from performing the modified-duty assignment.

As appellant has not submitted rationalized medical evidence supporting a causal relationship between her accepted employment injury and a recurrence of disability on January 29, 2002, she has failed to meet her burden of proof.

² *Carmen Gould*, 50 ECAB 504 (1999); *Lourdes Davila*, 45 ECAB 139, 142 (1993).

³ *Alfredo Rodriquez*, 47 ECAB 437, 441 (1996); *Louise G. Malloy*, 45 ECAB 613 (1994).

⁴ *See Mary A. Geary*, 43 ECAB 300 (1991); *Paul A. Clark*, 43 ECAB 940 (1992).

The decision of the Office of Workers' Compensation Programs dated June 5, 2002 is affirmed.⁵

Dated, Washington, DC
July 1, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁵ The Board notes that appellant submitted additional medical evidence to the Office subsequent to its June 5, 2002 decision. The Board cannot consider this evidence submitted after the Office's decision, as its review is limited by 20 C.F.R. § 501.2(c) to the evidence which was before the Office at the time of its final decision; *Dennis E. Maddy*, 47 ECAB 259 (1995).